IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-877

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONERS

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AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICUS CURIAE *

Construction is the Nation's largest industry, accounting for over 200 billion dollars of the gross national product and employing in excess of 4.7 million workers. A large percentage of these workers are covered under some form of union sponsored retirement pension plan, *e.g.*, multiemployer plans. The construction industry accounts for over 50 percent of all multiemployer plans currently in existence and for over one-quarter of the participants in them.

Amicus Curiae, the Associated General Contractors of America (hereafter AGC), is a national trade association that represents the interest of employers within the construction industry. Its members include over 8,100 general construction contractors directly employing in excess of 1.6 million workers, and indirectly employing 3.5 million workers. Of the approximately 3,800 multiemployer pension plans in the construction industry, AGC members are contributors to over 1,800 plans that are similar to the plan in issue in this litigation.

Two studies of the Pension Benefit Guaranty Corporation (hereafter PBGC), dated July 1, 1978, and September 16, 1978, disclose that contrary to previous expectations, an alarmingly high percentage of multiemployer pension plans are experiencing funding deficiencies. The effect of the Court of Appeals' decision in this litigation imposing substantial, new, and in most cases retroactive liabilities upon contributing employers to these plans will have an adverse effect upon

* Written consent of the parties to the filing of this brief has been obtained pursuant to Rule 42(1) of the Supreme Court Rules.

and irreparably harm AGC members. The inevitable result will be substantial and additional plan fund deficiencies leading to withdrawals from and terminations of existing plans. Accordingly, AGC's interest in this litigation is acute.

QUESTION PRESENTED

Whether the Court of Appeals erred in refusing to construe a "defined contribution plan" in its historical and generic context?

RELEVANT STATUTES

The relevant provisions of the Employee Retirement Income Security Act of 1974 (88 Stat. 829, 29 U.S.C. § 1001 *et seq.*) are as follows:

Sec. 3. For purposes of this title:

* * *

(34) the term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account. . . .

(35) The term "defined benefit plan" means a pension plan other than an individual account plan. . . .

* * *

(37)(A) The term "multiemployer plan" means a plan—

* * *

(iv) under which benefits are payable with respect to each participant without regard to the cessation of contributions by the employer who had employed that participant except to the extent that such benefits accrued as a result of service with the em-

ployer before such employer was required to contribute to such plan. . . .

Sec. 4021. (a) Except as provided in subsection (b), this section applies to any plan . . . .

* * *

(b) This section does not apply to any plan—

(1) which is an individual account plan, as defined in paragraph (34) of section 3 of this Act . . . .

RELEVANT PROVISIONS OF THE TRUST AGREEMENT

Article II

* * *

Section 4 . . . The Fund shall be administered by the Board of Trustees for the exclusive benefit of Employees and Retired Employees. . . .

* * *

Section 7 . . . [T]he liability of any Individual Employer . . . shall be limited to the payments required by the Collective Bargaining Agreements. . . .

Article IV

Section 1.(a) The Fund shall be administered by a Board of Trustees which shall consist of fourteen (14) Trustees. Seven (7) Trustees shall be appointed by the Union . . . and seven (7) Trustees shall be appointed by the Employers. . . .

Article V

* * *

Section 2. The Board of Trustees shall have . . . all powers reasonably necessary to maintain and operate the Plan. . . .

* * *

Section 5. Without limitation . . . the Board of Trustees shall have power:

* * *

(f) To invest . . . the assets of the Fund . . . except that no investment shall be made in the obligation or property of any Individual Employer. . . .

(g) To . . . procure insurance . . . to provide any or all of the benefits specified in the Pension Plans. . . .

* * *

(n) To maintain . . . bank accounts. . . .

* * *

Section 6. The Board of Trustees shall procure bonds for each Trustee . . . authorized to . . . deal with or draw upon the moneys in the Fund. . . .

Article VIII

* * *

Section 4. Neither the Employers, any Signatory Association, any Individual Employer . . . shall be responsible or liable for:

* * *

(b) The form validity, sufficiency, or effect of any plan, contract or policy for pension benefits. . . .

* * *

(d) The . . . investment of the Fund, or any portion thereof, or the disposition of any investment . . . or any loss or diminution of the Fund. . . .

Article IX

* * *

Section 2 . . . Neither the Employers, any Signatory Association, any Individual Employer . . . shall be liable for the failure or omission for any reason to pay any benefits under the Pension Plan.

HISTORY OF CASE

The District Court's decision, reported at 419 F.Supp. 737, construed the term "defined contribution plan" under the Employee Retirement Income Security Act of 1974 (hereafter ERISA), in its historical and generic meaning; i.e., since the Trust binds the contributing employers only to pay specified contributions, under which no fixed benefit is promised, it is a "defined contribution plan" within the meaning of § 3(34) and excluded from the termination insurance provisions of Title IV under § 4021(b)(1). 419 F.Supp. at 741.[1]

The Court of Appeals' decision, reported at 581 F.2d 729, reversed the District Court by holding that the Connolly Plan was not a "defined contribution plan" under § 3(34); therefore, it was subject to the termination provisions of Title IV, including the employer's

[1] In addition, the District Court ruled that § 4021(c)(1) was inapplicable to the Connolly Plan. That section provides that a "defined contribution plan" is covered by Title IV's termination insurance provisions if "a fixed benefit is promised [and] if the employer or his representative participated in the determination of that benefit." § 4021(c)(1). For the purposes of the Petition, since the Court of Appeals did not rule on this issue, the District Court's finding that § 4021(c)(1) is inapplicable should be presumed correct. Furthermore, the District Court's reason for the inapplicability of § 4021(c)(1)—the employer's lack of participation in the determination of benefits—is meritorious.

potential liability up to 30 percent of its net assets under § 4062. The Court adopted PBGC's literal construction of § 3(34). In total disregard of the historical and generic meaning, the Court concluded that under § 3(34), only those plans that provide for an individual account and benefits based solely on that account are defined contribution plans, regardless of the fact that the employers are contractually liable for only the specified contributions. 581 F.2d at 730. 733. Finally, the Court of Appeals concluded that Congress intended to impose "substantial, new, and in some cases retroactive liabilities upon contributing employers of the plan." 581 F.2d at 732.[2]

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN NOT CONSTRUING A DEFINED CONTRIBUTION PLAN IN ITS HISTORICAL AND GENERIC CONTEXT

A. The Historical And Generic Meaning Of A Defined Contribution Plan Includes The Connolly Plan

Prior to the enactment of ERISA, a dichotomy had developed between defined benefit and defined contribution plans. Under a defined benefit plan, the partici-

[2] Before the District Court, Connolly raised substantial questions concerning claims of the unconstitutionality of ERISA under the due process clause of the Fifth Amendment. This Court need not reach any issue thereunder because the Court of Appeals remanded such questions to the District Court. 581 F.2d at 734. However, it would appear in light of this Court's decision in *Allied Structural Steel Co.* v. *Spannus*, —— U.S. ——, 98 S.Ct. 2716 (1978), concerning a state's private pension benefits' protection act and its retroactive application imposing substantial and severe impairment of contractual obligations as violative of Art. 1, § 10 of the *United States Constitution*, that there is substantial merit to Con-

pants were promised by the contributing employer a specified *benefit* and contributions were in the amount actuarially sufficient to provide the promised benefits. Any favorable performance of the fund's assets over and above the amount needed to pay the promised benefits redounded to the benefit of the employer. See Welch, *Investment for Management and Employment Benefit Trust—Waiver and Modification of the Prudent Man Rule,* 108 Trusts and Estates 350, 351 (1971); Note, *Fiduciary Standards and the Prudent Man Rule Under the Employee Retirement Income Security Act of 1974,* 88 Harvard Law Review 960, 977 (1975). Conversely, if the employer's contribution was insufficient to enable the fund to meet its liabilities as they became due, the employer was liable for the amount of benefits promised. *See e.g., International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)* v. *Cardwell Manufacturing Company,* 416 F.Supp. 1267 (D. Kan. 1976); *Briggs* v. *Michigan Tool Company,* 369 F.Supp. 920 (E.D. Mich. 1974).

Under a defined contribution plan, which historically included such plans as target benefit, stock bonus, individual account, profit sharing, thrift, and money purchase, the employer's *contribution* was specified while the participant's ultimate pension benefit depended upon the rate of return. The employer's contribution was determined either by a flat sum or by a formula, based upon, *e.g.,* actuarial tables for service, with the ultimate distribution determined by the share of the

nolly's claims. In addition, there was substantial concern about this problem by Congress prior to the enactment of ERISA. See 1974 U.S. Code Congressional Administrative News at 4666-67.

fund's assets allocable to the retiring individual. The employer's liability to the defined contribution plan, however, was limited to the amount of the unpaid specified contributions in default. *See, e.g., Calhoun* v. *Bernard,* 369 F.2d 400 (9th Cir. 1966); *Brown* v. *Wilson & Co. Inc.,* 230 F.2d 280 (7th Cir. 1956); *Hann* v. *Harlow,* 271 F.Supp. 674 (D. Ore. 1967).

Under most multiemployer pension plans, including the Connolly Plan, all signatory employers specify certain contributions rather than promised benefits. These specified contributions were pooled into one fund. The reasons therefor are obvious: *e.g.,* a large number of participants under a plan; the necessity for the simplification of the administration of the trust accounts and the fund's assets by the independent trustees; and, the advantages for investment purposes of pooled funds rather than small individual investments from the funds in an individual account.

Under § 202(a)(2) of ERISA, one type of defined contribution plan is a "target benefit plan," as defined by the Secretary of Treasury. The Secretary of Treasury, one government agent administering ERISA, has continued to recognize the historical dichotomy between defined benefit and contribution plans in relation to multiemployer pension plans. In regulations under § 410 of the Internal Revenue Code, the Secretary describes a "target benefit plan" as a ". . . defined contribution plan under which the amount of employer contributions allocated to each participant is determined under a plan formula which does not allow employer discretion and on the basis of the amount necessary to provide a target benefit. . . ." IRC Reg. § 1.410 (a)-4; Treasury Decision 73-80. Likewise, the Secretary

of Labor, another government agent administering ERISA, has recognized that one type of a defined contribution plan is a "target benefit plan." *See* Form EBS-1 Plan Description and Instruction (1975). On December 12, 1978, regulations were published by the Secretary of Labor reflecting his current recognition that defined contribution plans do not require individual accounts for each participant.[3] Thus, the Connolly Plan, with fixed contributions by employers to a pooled fund which provides pension benefits to eligible participants, is characterized as a "target benefit plan."

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[3] These regulations are proposed interpretations of the 1978 amendments of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* 43 Fed. Reg. 58150-151 (1978), 29 C.F.R. §§ 850.17(e)(2)(i)(A) and (B) (1978):

> (i) *Defined contribution plans.*
>
> (A) *Separate accounts maintained.* If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.
>
> (B) *Separate accounts not maintained.* If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, the proportion of the total benefit attributable to employee contributions is determined by multiplying that benefit by a fraction—
>
> (1) The numerator of which is the total amount of the employee's contributions under the plan (less withdrawals), and
>
> (2) The denominator of which is the sum of the numerator and the total contributions made under the plan by the employer on behalf of the employee (less withdrawals).

B. Congress' Intent In Passing ERISA Was Not To Alter The Historic And Generic Meaning Of A Defined Contribution Plan

The legislative history of ERISA involved numerous committee reports and revisions from both houses prior to ERISA's enactment. However, the comments of members of Congress on the final reported version of the Joint House and Senate Committees strongly infer that the intent of Congress was to adopt the generic and historical meanings of defined contribution and defined benefit plans and not to impose substantial, new or retroactive liabilities upon employers under Connolly-type plans.

Senator Jacob Javits stated that a § 3(34) plan includes "a target benefit plan." Cong. Rec. S.15745 (daily ed. Aug. 22, 1974). Congressman Al Ullman, Chairman of the House Ways and Means Committee, stated:

> I want to emphasize that these new requirements [including plan termination insurance under Title IV] had been carefully designed to provide adequate protection for employees and, at the same time provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed.

Cong. Rec. H.R. 8702 (daily ed. Aug. 20, 1974). Chairman Ullman's concern of not having ERISA impose new and substantial liability on employers was reiterated by Congressman Harold R. Collier, who stated

that "[ERISA] should not be implemented in a way which will force employers to end their plans or perhaps discourage other employers from beginning them." Cong. Rec. H.R. 8714 (daily ed. Aug. 20, 1974).

This Court also has recognized that the historical difference between defined contribution and defined benefit plans was unaltered by the enactment of ERISA. *Alabama Power Company* v. *Davis,* 431 U.S. 581, 97 S.Ct. 2002 (1977). In *Davis*, this Court observed that ERISA does not alter the nature of pension plans, at least concerning questions under the Military Selective Service Act, 50 U.S.C. §§ 459(b) and (d). 97 S.Ct. at 2008, n.13. The Court further stated that:

> Petitioner's plan is a "defined benefit" plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a "defined contribution" plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. See 29 U.S.C. § 1002(34), (35).

97 S.Ct. at 2009, n.18.

C. Statutory Construction Supports The Generic Meaning That The Connolly Plan Is A Defined Contribution Plan

The Court of Appeals erred by totally disregarding the generic meaning of a "defined contribution plan" since statutory construction supports the District Court's finding that the Connolly Plan is a § 3(34) plan. Normally, the starting place involving the construction of a statute is the language itself. *See e.g., Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976). However, this Court and the lower courts have construed seemingly clear statutory terms based upon their generic meaning when to do otherwise would subvert the intent of Congress. *See e.g., NLRB* v. *Radio and Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO,* 364 U.S. 573 (1961).

In a case just decided, this Court construed the coverage of § 2(1) of the Securities Act, 15 U.S.C. § 77b(1), and § 3(a)(10) of the Securities Exchange Act, 15 U.S.C. § 78c(a)(10), concerning an employee's participation in a noncontributory, compulsory pension plan, pursuant to the commonly held understanding of an investment contract. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Daniel,* ——U.S. ——, Nos. 77-753 & 754 (January 16, 1979).[4] *Also see NLRB* v. *Servette, Inc.,* 377 U.S. 46 (1964), construing conduct prior to the 1959 amendments of the National Labor Relations Act (hereafter NLRA) to determine its post amendment validity under §§ 2(2) and (3), 29 U.S.C. § 152 (2) and (3), and § 8(b)(4)(A), 29 U.S.C. §§ 158 (b)(4)(A). Likewise, the Ninth Circuit, in a decision prior to *Connolly,* construed the language of § 2 of the NLRA's definition of "employer" to include an airline notwithstanding that section's exclusion of

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[4] In dicta, in note 3 of *Daniel,* the Court did state that the plan provided a defined benefit, citing § 3(35) of ERISA, because the Fund made the same payments to each eligible participant "rather than establishing an individual account for each employee tied to the amount of employer contributions attributable to his period of service[.]" It seems clear that this is tangential dicta in *Daniel,* not briefed or argued, since the sole issue concerned whether the plan was a "security" under the Securities Acts. Therefore, the issue in *Connolly* has not been answered by this Court.

employers covered by § 201 of the Railway Labor Act, 45 U.S.C. § 181, which includes common carriers tranporting by air. *Marriott Corp.* v. *NLRB,* 491 F.2d 367 (9th Cir. 1974). The Court of Appeals therefore erred in totally disregarding the generic meaning of a "defined contribution plan" in its construction of § 3(34) of ERISA.

The statutory construction of §§ 3(34) and 3(37) supports the generic meaning that the Connolly Plan is a defined contribution plan. The absence of express language of §§ 3(34) and 3(37) of ERISA to exclude "target benefit plans," such as the Connolly Plan, as defined contribution plans further substantiates Connolly's argument that a defined contribution plan should be given its generic meaning rather than its literal construction under § 3(34). The language in § 3(34) describes an individual account plan. Generically, as previously noted, an individual account plan is but one type of a defined contribution plan. Other types of defined contribution plans include target benefit, stock bonus, profit sharing, thrift, and money purchase. The language in § 3(34) is therefore descriptive of one type of defined contribution plan rather than inclusive of all types of defined contribution plans as construed by the Court of Appeals.

If Congress had intended to alter drastically the generic meaning of defined contribution plans, it would have expressly stated that *all* such plans are to have the two elements describing an individual account plan. Yet, it did not under § 3(34). Likewise, if Congress had intended that *all* "target benefit plans" (multiemployer pension plans) are defined benefit plans, it would have expressly stated such. Yet, it did

not under § 3(37). Therefore, considering the invalidity of PBGC's reasoning, the inconsistency of PBGC's position with earlier and later pronouncements of the Secretaries of Labor and Treasury, and the lack of thoroughness evident in its consideration, deference should not be given to PBGC's literal construction of § 3(34). *See, e.g., General Electric Company* v. *Gilbert,* 429 U.S. 125 (1976); *Skidmore* v. *Swift & Company,* 323 U.S. 134, 140 (1944).

II.

THE QUESTION OF WHETHER § 3(34) EXCLUDES VIRTUALLY ALL MULTIEMPLOYER PLANS IS OF CRUCIAL IMPORTANCE

The question of whether § 3(34) of ERISA excludes virtually all multiemployer plans is of crucial importance which has not been but should be settled now by this Court. AGC members are contributors to over 1,800 Connolly-type plans. The average assets of these employers is in excess of 1.325 million dollars while the plans cover over 2 million workers nationwide.

The effect of the Court of Appeals' decision will cause substantial, new, and retroactive liabilities to be imposed upon the contributing employers: up to 30 percent of an individual employer's net assets under § 4062 of Title IV of ERISA. Most individual employers could not bear the burden of such substantial increased liability. Moreover, their credit ratings will be adversely affected; their borrowing power will be diminished; the magnitude of past service liabilities will be increased as pension benefits are "sweetened"; and, pension costs will be higher due to ERISA requirements, i.e., early eligibility, faster vesting, and fuller funding. These uncontrollable cost increases in an inflationary era—totally unrelated to a company's

productivity or ability to pay—will also have a substantial and adverse economic effect on all contributing employers.[5]

The inevitable result of the Court of Appeals' decision will be what Congressmen Ullman and Collier feared: withdrawal from and termination of existing plans as well as the exclusion of the development of new plans. In Congressman Ullman's words: "This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed." Cong. Rec. H.R. 8702, *supra.*

Furthermore, conflicting duties are now imposed upon the trustees of the Connolly Plan and all other like-multiemployer plans. The trustees must not only act as fiduciaries for the participants, but must also act on behalf of the contributing employers; the employers are contingently liable for the eventual cost of benefits as adopted by the trustees and determined pursuant to investments by them under the trust agreement. The loss of the trustees' independence is inevitable, contrary to ERISA and prior laws. *See, e.g., Toensing* v. *Brown,* 528 F.2d 69, 72 (9th Cir. 1975); *Sheet Metal Workers' International Association and Edward J. Carlough (Central Florida Sheet Metal Contractors Associations, Inc.),* 234 NLRB 162 (1978).

Finally, the future administration of the termination insurance provisions of Title IV by PBGC will be

[5] In addition, dividends of a company's shareholders would either dramatically be reduced or totally nullified. The extreme personal hardship that would result to individual shareholders who depend on such dividends for, *e.g.,* living expenses, payment of bills, and retirement income would be catastrophic. The entire economy of this Nation would be adversely affected.

substantially affected by the Court of Appeals' decision. PBGC estimates that there presently exist 900 multiemployer defined benefit plans. The Department of Labor estimates that 1,800 Connolly-type plans presently exist. The effect of the substantial increase in the number of plans subject to PBGC's administration of Title IV will be catastrophic. Moreover, unless this Court grants Connolly's Petition, future litigation will occur in other circuits, further inhibiting PBGC's administration of Title IV. In fact, the issue of the scope of § 3(34) is presently pending before the United States Court of Appeals for the Sixth Circuit. *See PBGC* v. *Defoe Shipbuilding Co.,* No. 77-10151 (E.D. Mich. February 28, 1978), *appeal pending,* No. 78-1280 (6th Cir. August 7, 1978).

CONCLUSION

For the reasons stated, Connolly's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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